Chin Hooi Nan v Comprehensive Auto Restoration Service Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2-11-100-93
SITI NORMA YAAKOB J
30 DECEMBER 1994

Contract *— Exemption clause — Liability for negligence — Car polishing service — Car damages while being driven by employee — Whether liability excluded — Whether defendants had burden of proving damage was not due to their negligence — Whether could recover costs of repairs and rental of another car*

Tort *— Negligence — Damage to car at polishing centre — Whether centre could rely on exclusion clause on receipt — What damages recoverable*

Civil Procedure *— Documents — Marking of documents as exhibits — Whether maker of document must be called before document can be marked as exhibit*

The appellant had, on payment of RM295 to the respondents, agreed to have his car waxed and polished by them. He left his car at the respondents' premises in the basement of the Sungai Wang Plaza Complex and was given a receipt ('the receipt') with which to claim for the car. When the appellant returned to collect his car from the respondents, he found that it had been damaged while being driven by an employee of the second respondent to a lower floor of the basement. The appellant sued the respondents for the costs of repairing the car at RM3,630.85; costs of hiring another car for one month at RM1,790; 25% depreciation in the value of the car at RM9,128.81; and costs of engaging an independent adjuster at RM169. The suit was dismissed with costs after a full trial in the magistrates' court on the ground that an exemption clause at the back of the receipt which stated that the respondents were 'not liable for any loss or damage whatsoever of or to the vehicle, its accessories or contents. Vehicle and goods are at owner's risk' exonerated the respondents. The appellant appealed. At the appeal, the respondents raised the objection that relevant documents relating to the appellant's claims, eg the receipt for the costs of repairs ('the repair receipt') and the appellant's credit card receipt, were only marked for identification and not as exhibits. The makers were not called, thereby denying the respondents of the opportunity to cross-examine them.

Held, allowing the appeal with costs:

(1) It is settled law that an exemption clause however wide and general does not exonerate the respondents from the burden of proving that the damage caused to the car were not due to their negligence and misconduct. They must show that they had exercised due diligence and care in the handling of the car.

(2) In this instance, the respondents had not adduced any evidence to show that they had exercised due care and diligence when handling the appellant's car. On the contrary, there was ample evidence to show that the respondents had been negligent when their employee had involved the car in an accident while driving it to a different floor of the basement car park. On this conclusion, the appeal must be allowed.

(3) Although the maker of the repair receipt was not called, this should not have prevented the magistrate from marking it as an exhibit, particularly when the appellant had produced a copy of his credit card receipt to show that he did make such payment. The receipt for the rental of another car too could easily have been marked as an exhibit.

(4) The court allowed the costs of repairs at RM3,630.85; costs of hiring another car for one month at RM1,790; and costs of engaging an adjuster at RM169. However, the claim for depreciation at 25% was disallowed as there was no evidence to support such a rate of depreciation. Depreciation occurs regardless of whether there has been an accident or not, the only difference being the rate of depreciation which in this case was not proved. Interest on all sums allowed was awarded at 8%pa from the date of damage to date of payment.

[Bahasa Malaysia summary

Perayu telah bersetuju untuk membenarkan keretanya digilap dengan penggilap berlilin oleh responden atas bayaran sebanyak RM295. Beliau telah meninggalkan keretanya di premis responden di tingkat bawah tanah Kompleks Sungai Wang Plaza dan diberi suatu resit ('resit itu') untuk menuntut kereta itu. Apabila perayu kembali untuk mengambil keretanya daripada responden, beliau mendapati bahawa kereta itu telah mengalami kerosakan semasa dipandu oleh seorang pekerja responden kedua ke tingkat yang lebih rendah lagi di tingkat bawah tanah itu. Perayu telah mendakwa responden untuk kos membaiki kereta itu berjumlah RM3,630.85; kos menyewa sebuah kereta lain selama satu bulan berjumlah RM1,790; susut nilai kereta itu sebanyak 25% berjumlah RM9,128.81; dan kos menggaji seorang penyelaras kerugian bebas berjumlah RM169. Guaman itu telah ditolak dengan kos selepas suatu perbicaraan penuh di mahkamah majistret atas dasar bahawa fasal pengecualian di belakang resit itu yang menyatakan bahawa responden tidak 'bertanggungjawab untuk sebarang kehilangan atau kerosakan kepada kenderaan itu, aksesori atau kandungannya. Kenderaan dan kandungan adalah pada risiko pemunya' telah melepaskan responden daripada liabiliti. Perayu telah membuat rayuan. Pada rayuan ini, responden telah menimbulkan bantahan bahawa dokumen relevan berkenaan dengan tuntutan perayu, misalnya resit untuk kos pembaikan ('resit pembaikan') dan resit kad kredit perayu, hanya ditandakan bagi tujuan pengenalpastian

dan bukan sebagai ekshibit. Pembuat mereka tidak dipanggil, lalu tidak memberikan responden peluang untuk memeriksa balas mereka. A

Diputuskan, membenarkan rayuan itu dengan kos:

(1) Adalah menjadi undang-undang mantap bahawa sesuatu fasal pengecualian walau bagaimana luas dan am, tidak melepaskan responden daripada beban membuktikan bahawa kerosakan yang diakibatkan kepada kereta itu tidak disebabkan oleh kecuaian dan salah laku mereka. Mereka mesti menunjukkan bahawa mereka telah menggunakan kerajinan dan ketelitian yang berpatutan apabila mengendalikan kereta itu. B C

(2) Di dalam kes ini, responden tidak mengemukakan sebarang bukti untuk menunjukkan bahawa mereka telah menggunakan kerajinan dan ketelitian yang berpatutan apabila mengendalikan kereta perayu. Sebaliknya, terdapat bukti yang lebih daripada cukup untuk menunjukkan bahawa responden telah cuai apabila pekerja mereka telah melibatkan kereta itu dalam suatu kemalangan semasa memandunya ke tingkat yang lain di tempat letak kereta bawah tanah itu. Atas pendapat ini, rayuan ini mesti dibenarkan. D

(3) Walaupun pembuat resit pembaikan tidak dipanggil, ini tidak seharusnya menghalang majistret daripada menandakannya sebagai suatu ekshibit, terutamanya kerana perayu telah mengemukakan satu salinan resit kad kreditnya untuk menunjukkan bahawa beliau telah membuat bayaran tersebut. Resit bagi penyewaan kereta lain juga boleh ditandakan sebagai suatu ekshibit dengan mudah. E

(4) Mahkamah membenarkan kos pembaikan sebanyak RM3,630.85; kos menyewa sebuah kereta lain selama sebulan sebanyak RM1,790; dan kos menggaji seorang penyelaras sebanyak RM169. Bagaimanapun, tuntutan untuk susut nilai pada kadar 25% tidak dibenarkan kerana tidak terdapat keterangan untuk menyokong kadar susut nilai tersebut. Susutan nilai berlaku tidak kira sama ada suatu kemalangan telah berlaku atau tidak, perbezaannya hanya pada kadar susut nilai, yang tidak dibuktikan di dalam kes ini. Faedah atas semua jumlah yang dibenarkan diawardkan pada kadar 8% setahun dari tarikh kerosakan ke tarikh pembayaran.] F G

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Notes

For cases on exemption clauses, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1549–1559.

Cases referred to

I

Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd [1978] 2 MLJ 137 (folld)

Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd [1959] MLJ 200 (folld)

A *KF Chin* (*Lee Boon Peng & Co*) for the appellant.
Yip Fook Thai (*Yip & Co*) for the respondents.

Cur Adv Vult

B **Siti Norma Yaakob J**: The appellant's suit against the respondents was dismissed with costs after a full trial in the magistrates' court. The appellant's case is founded on the following facts which are not disputed by the respondents.

The appellant had, on payment of RM295 to the respondents, agreed to have his car waxed and polished by them. It was for that very purpose C that he had, on 21 March 1991, at about 12.45pm, left his car bearing registration No WCE 6282 at the respondents' premises in the basement of Sungai Wang Plaza Complex, Bukit Bintang, Kuala Lumpur. He was given a receipt with which he could claim for the car after the job of waxing and polishing had been completed.

D At about 2.30pm the same day, the appellant returned to collect his car from the respondents but was appalled to see that it had been damaged. On being questioned, the chief supervisor of the second respondent admitted that an employee had damaged the car whilst the car was being driven by the employee to a lower floor of the basement.

E In his suit, alleging negligence on the part of the respondents, the appellant made the following claims:

(1) costs of repairing the car at RM3,630.85;

(2) costs of hiring another car for one month at RM1,790;

(3) 25% depreciation in the value of the car at RM9,128.81; and

F (4) costs of engaging an independent adjuster at RM169.

The appellant and the adjuster that he had engaged testified at the trial but the respondents elected not to offer any evidence. The magistrate, whilst agreeing that a contract existed between the parties, dismissed the appellant's G claim principally on the ground that an exemption clause which appears at the back of the receipt that was handed to the appellant exonerated the respondents from any blame whatsoever for the damages caused to the car. That exemption clause is worded as follows:

> The company is not liable for any loss or damage whatsoever of or to the vehicle, its accessories or contents. Vehicle and goods are at owner's risk.

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Before me the issue is whether such an exemption clause can absolve the respondents from any blame for the damages caused to the car. The law on this is quite settled in that an exemption clause however wide and general does not exonerate the respondents from the burden of proving that the damages caused to the car were not due to their negligence and misconduct. I They must show that they had exercised due diligence and care in the handling of the car. *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] MLJ 200, and *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1978] 2 MLJ 137, are authorities for this proposition of the law.

In this instance, the respondents had not adduced any evidence that they had exercised due care and diligence when handling the appellant's car. On the contrary, there is ample evidence to show that the respondents had been negligent when one of their employees had involved the car in an accident when he, the employee, was driving it to a different floor of the basement car park. On this conclusion, the appeal must be allowed.

There was also an objection raised by the respondents that relevant documents relating to the appellant's claims were only marked for identification and not as exhibits. The makers were not called, thereby denying the respondents the opportunity to cross-examine them. One of such documents is the receipt for the costs of repairs produced by the appellant himself and to support such payment, he had also produced his credit car receipt at p 82 of the appeal records. Although the maker of the receipt was not called, this should not have prevented the magistrate from marking the receipt an exhibit, particularly when the appellant had produced a copy of his credit card receipt to support his claim that he did make such payment for the repairs to the car. Hence the costs of the repairs are allowed at RM3,630.85.

There was also another receipt to support the appellant's claim for the rental of another car and this too could easily be marked as an exhibit. As this is a reasonable claim, I had also allowed the costs of rental for another car for one month at the costs of RM1,790. However, I disallowed the claim for depreciation at 25% as there is no evidence to support such a rate of depreciation as depreciation occurs regardless of whether there has been an accident or not, the only difference being the rate of such depreciation which in this case was not proved.

I also allowed the appellant's claim for the costs of engaging and adjuster for he did so and the adjuster had testified to that effect.

In allowing this appeal with costs, I had also allowed the following sums to be paid by the respondents to the appellant:

(1)	Costs of repairs	RM3,630.85
(2)	Costs of hiring another car	RM1,790.00
(3)	Costs of paying adjuster	RM169.00
		RM5,589.85

with interest at the rate of 8%pa from 21 March 1991 to date of payment and costs.

Appeal allowed.

Reported by Anne Khoo